

may have changed his intention between the year 1740 and 1754; so that there is no arguing from the one deed to the other.

No. 45.

To the *3d*: The pursuer does not found on the back-bond as an alteration of the succession; but only as a circumstance to show that Sir Robert the disponent did not understand, that, by any of the former deeds, the lands of Standingstones had been set into a different channel of succession from the rest of the estate.

The Lords "Found, that the property of the lands of Standingstones was a trust in the person of Alexander Burnet, and that he must re-convey it to the pursuer, and his heirs succeeding him in the barony of Leys, to be holden of the said Alexander during his life, for payment of £.1 10s. Scots of feu-duty; and, after his death, to be consolidated with the superiority, in the person of the pursuer, and his heirs succeeding him in the said barony."

G. F.

Fac. Coll. No. 3. p. 221.

Act. Macqueen, Sir David Dalrymple. Alt Miller. Advocatus, Montgomery. Reporter, Kennet.

* * This case having been appealed, the House of Lords, 30th April, 1766, ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutor complained of be affirmed. And it is farther ordered, that the appellant do pay to the respondent £.80 costs, in respect of the said appeal.

1766. June 17.

MR. WILLIAM BAILLIE, Advocate, *against* MRS. AGNES TENNANT.

Alexander Walker of Stonypath left two children, viz. a son, William, afterwards Minister at Mackerston, who succeeded to the estate of Stonypath, and a daughter Isobel.

The daughter married John Tennant of Hundaxwood, by whom she had two children, Alexander, afterwards Colonel Tennant, and a daughter, Agnes Tennant.

After Mr. Tennant's death, Isobel Walker entered into a second marriage with Thomas Baillie, writer to the signet, by whom she had three sons and a daughter, and Mr. William Baillie was the eldest of these sons.

William Walker, the son and heir of Alexander Walker of Stonypath, in 1752, executed a deed of settlement of the following tenor: "I Mr. William Walker of Stonypath, Minister of the Gospel at Mackerston, for the love, favour, and affection I have and bear to my sister, and her children after-named, upon whom I am resolved to settle my real estate, and to prefer them thereto next after the issue of my own body, in the order of succession, and in the terms and under the conditions underwritten; wit ye me to have given, granted, and disposed, &c. to myself in life-rent, and to the heirs-male of my body; whom failing, to the heirs-female of my body, in fee; whom failing, to Isobel Walker my sister, relict of John Tennant of Hundaxwood, now spouse to Thomas Baillie of Polkemmet, writer

No. 46.

Interpretation of the word "heirs" in a settlement.

No. 46. to the signet, in life-rent, for her life-rent use allenarly, in case she shall happen to survive me, and, after her decease, to Alexander Tennant, now of Hundaxwood, Lieutenant in Lord Burry's regiment of foot, my nephew, eldest lawful son to my said sister, and procreated between her and the said deceased John Tennant, and his heirs and assignees in fee; whom failing, to William Baillie, eldest lawful son to the said Thomas Baillie, procreated between him and my said sister, his heirs or assignees, also in fee; whom failing, to my own nearest and lawful heirs and assignees whatsoever."

William Walker, the maker of the above deed of settlement, died without issue in 1759; and Lieutenant-Colonel Tennant, the fiar of the estate, died in 1769, without issue, or making any settlement.

Upon the death of Colonel Tennant, Mr. William Baillie, the eldest son of Isobel Walker by her second marriage, and Agnes Tennant, spouse to Mr. Chatto, daughter to the said Isobel Walker by her first marriage, severally purchased brieves, for serving themselves heirs of provision to Mr. Walker, under the deed of settlement above-mentioned; and a debate ensuing upon this competition of brieves, it was taken by the Lords assessors to report of the Court.

The plea maintained by Mr. Baillie was, That he, being called *nominatim*, failing Lieutenant-Colonel Tennant and his heirs, the word "heirs," in that destination, must be understood heirs of the body of Colonel Tennant; and, these having failed, he, as next substitute, was called to the succession.

Mrs. Agnes Tennant's plea resolved into this, That she, as sister-german to Lieutenant-Colonel Tennant, was his heir; and, in that character, called to the succession by Mr. Walker's deed of settlement, in preference to Mr. Baillie.

Pleaded for Mr. Baillie: That the word "heir" is a flexible word, capable of more comprehensive or limited construction, according to circumstances: That, in this case, the word "heir" must be taken in a limited sense, as descriptive only of the heirs of Colonel Tennant's body: That the use of words is to convey the meaning and intendment of parties, and the *voluntas* is the *suprema lex*: That the intention of Mr. Walker, in the present case, appears to have meant no more than that the heirs of Colonel Tennant's body should be preferred to Mr. Baillie: That, in practice, the word "heirs," in settlements, when applied to the different substitutes, is understood to mean no more than the heirs of their respective bodies, till the last branch of substitution, where the termination is generally in favours of heirs and assignees whatsoever.

That, to listen to the plea maintained by Mrs. Tennant, would not only defeat the intendment of Mr. Walker's settlement, but would likewise be attended with the greatest absurdities; because, according to it, every extraneous heir of Colonel Tennant, in whatever degree, rank, or condition, though not one drop of blood to Mr. Walker, or his family, must be preferred to Mr. Baillie and Mr. Walker's other nephews and nieces by his sister; and, by the same plan of argument, the substitution, in favour of Mr. Baillie, was, from the beginning, altogether nugatory and good for nothing, as it never could take effect, upon the supposition, that, on

the death of Colonel Tennant, the estate must go to his collateral relations and heirs, to the remotest generation; and even, should these fail, by the same rule, no good reason occurs why the Sovereign should not take it as *ultimus hæres*; as, in many cases, it has been found, that the King, taking as last heir, has the same privileges with other heirs, particularly that he cannot be hurt by any death-bed deed. And it was farther argued, that, from the very words and meaning of the deed itself, Mr. Walker's intention of calling Mr. Baillie, in preference to Colonel Tennant's heir in general, was evident.

And, in support of this plea, the following authorities were quoted; L. 102. De condit. et demonstrat.; L. 30. Cod. De fidecom.; L. 57. § 1. D. Ad S. C. Trebel.; L. 25. § 1. D. De lib. et post.; L. 17, 18, and 19, D. De leg.; L. 24. D. De reb. dub.; L. 67. D. De reg. jur. L. 96. eod. Lord Stair, B. 3. Tit. 5. § 12.; Dictionary of Decisions under the present Title; L. 17. § 8. D. Ad senat. consult. Trebell.; Bartolus' commentary on said law; Paulus de Castro ad L. 29. De Lib. et posthum.; Alexander Tartagno, Lib. 5. conciliorum concil. 125; Mantica de conjecturis ultimarum voluntatum, Lib. 8. Tit. 14; Wessenbachius' commentary ad Tit. De verb. signif. L. 65; and Gothfred, ad eandem legem. Several authorities were likewise quoted from the law of England, particularly Peere Williams, vol. 1. fol. 23; Trinity term, 1700; Notingham *versus* Jenkins; Web *contra* Herrin; Parker *versus* Thacker; Tindal's translation of Rapin's history, vol. 2. p. 68. and vol. 2. p. 74; Bayle's Dictionary, Art. Fran. I. King of France, remark C.

Answered for Mrs. Tennant: That she is called, by the clear words of the deed, under the description of the heirs of Colonel Tennant: That there can be no doubt that she is the heir of Colonel Tennant, being his sister-german: That Mr. Baillie is only called, failing Colonel Tennant, and his heirs, and assignees: That so plain and rational a settlement ought not to be overturned upon conjectures and presumptions of a contrary will in the testator: That, in the present case, Mrs. Tennant is as nearly relied to Mr. Walker as Mr. Baillie is: That, where there has been a former settlement, it has sometimes been disputed, whether the word "heir," in an after settlement, meant the heir of the former investitures or the heir at law; but, where there was no former settlement, as in this case, the meaning of the word "heir" never was disputed.

That, from the words of the deed, it does not appear Mr. Walker's intention was, that, failing Colonel Tennant, Mr. Baillie should succeed. That the authorities from the old Doctors of the civil law, such as Bartolus, &c. ought to have little weight, considering the period at which they lived; and, at any rate, they applied only to *fidei commissarii* substitutions, in which a liberty of interpretation was taken by the Roman lawyers, which never was applied to direct substitutions.

"The Lords found, that the claimant Mr. William Baillie is preferable, and entitled to be served heir of provision to the deceased Mr. William Walker, under the settlement above-mentioned. Repel the objections to the service of the said Mr. William Baillie," &c.

A reclaiming petition for Mrs. Tennant was refused without answers.

For Baillie, *Lockhart*.

For Mrs. Tennant, *J. Burnet*.

Clerk.

S.

Fol. Dic. v. 4. p. 306. Fac. Coll. No. 39. p. 66.

- No. 46. * * This case having been appealed, the House of Lords, 26th March, 1770, ORDERED and ADJUDGED, That the interlocutors complained of be reversed ; and it is declared, that John Chatto is preferable, and entitled to be served heir of provision to the deceased Mr. William Walker, under the settlement made by him of his estate of Stonypath in 1752. And it is further ordered, That the objection to the service of the said John Chatto be repelled, and the mutual declarators be conjoined, and the said John Chatto assoilzied from the process of declarator at the instance of the said William Baillie ; and that the Court of Session do find, in terms of the declarator at the instance of Agnes Tennant, mother of the said John Chatto, against the said William Baillie. And it is further ordered, That the said Court of Session do give all necessary and proper directions for carrying this judgment into execution.

1766. June 24.

SIR JOHN SINCLAIR *against* The COUNTESS and EARL FIFE.

No. 47.
Nearest heir-
male of line
whatsoever.

Alexander, Earl of Caithness, by a strict entail, devised his own estate, and also the estate of Murkle, in which he had succeeded to his brother Lord Murkle, to himself and the heirs-male of his body ; whom failing, to his brother Francis, and the heir-male of his body ; whom failing, to the second and younger sons, successively, to be procreated of the body of Lady Dorothea his daughter ; whom failing, “ to George Sinclair of Woodhall, Esq. one of the senators of the College of Justice, and the heirs-male of his body ; whom failing, to the said George Sinclair, his nearest lawful heir-male of line whatsoever ; whom failing, to his own nearest heirs and assignees whatsoever.”

The title and honours of Caithness were descendible to heirs-male, and failing his own and his brother's male issue, devolved upon remote heirs not called in the entail, and whom the Earl did not mean to favour. This led him to insert a clause, That, excepting the heirs of his own body, his brother Francis, and the heirs-male of his body, the whole heirs succeeding to the estate should bear the name and arms of Sinclair of Murkle only, and should forfeit their right upon succeeding to any title of peerage.

Lord Woodhall was the third son of the family of Stevenston. Sir Robert, the eldest, had died, leaving male-issue. John Lockhart of Castlehill, the second, was also dead, and had left only daughters. Patrick Sinclair, the fourth, was a bachelor.

After the execution of the deed, Francis Sinclair, Lord Woodhall, and Patrick Sinclair, all died without issue. The Earl also died, leaving issue a daughter, Dorothea, Countess of Fife, who was as yet childless.

Sir John Sinclair, eldest son of Sir Robert Sinclair of Stevenston, apprehending himself to be called under the description of nearest heir-male of line whatsoever to Lord Woodhall, purchased brieves for serving nearest and lawful heir of tailzie and provision in general to the Earl of Caithness.